

Office of the Attorney General State of Texas

DAN MORALES

ATTORNEY GENERAL

April 2, 1998

Ms. Linda Wiegman Supervising Attorney Office of General Counsel Texas Department of Health 1100 West 49th Street Austin, Texas 78756-3199

OR98-0881

Dear Ms. Wiegman:

You ask this office to clarify our ruling in Open Records Letter No. 98-0386 (1998). Your request for clarification was assigned ID# 114660.

The Texas Department of Health (the "department") received a request for information about Carter's Special Care Home, A Pro Home Health Care Agency, and St. Anne Home Health Care. In Open Records Letter No. 98-0386 (1998), this office concluded in part that the department could not withhold the requested information under section 552.103 of the Government Code, as the department had failed to timely raise the exception. We further concluded that federal law requires the department to release certain responsive information. Although you admit that the department did not request a ruling from this office within ten days of receiving the request, you state that it was impossible for the department to raise the litigation exception within that time period because no litigation was pending when the request was received. You contend that the fact that the department requested a ruling from the attorney general within ten business days from the filing of the lawsuit overcomes the presumption that the information is public information.

Section 552.301 of the Government Code imposes a duty on a governmental body seeking an open records decision to submit that request to the attorney general within ten business days after the governmental body's receipt of the request for information, and to raise the exceptions that apply. Thus, this office determines the applicability of a particular exception as of the date the request was received by a governmental body. The department

¹However, if a governmental body has timely raised section 552.103 for reasonably anticipated litigation, a governmental body should timely notify this office of a change in circumstances regarding the pending file. *See* Open Records Decision No. 638 (1996).

received the request for records on September 25, 1997, and did not request a ruling from this office until November 19, 1997. The department did not raise section 552.103 within ten business days of receiving the request for information. As section 552.103 is a discretionary exception, the failure to timely raise section 552.103 results in the waiver of its protection. See Open Records Decision No. 551 (1990) (section 552.103 is discretionary).

Furthermore, even if we concluded that the department had timely raised section 552.103, we do not believe that you have sufficiently explained to this office how the requested documents concerning the three agencies relate to the litigation filed against the department. In order to obtain the protection of section 552.103 of the Government Code, a governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. See Heard v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Although you state that a lawsuit has been filed against the department, you do not explain how the requested documents relate to the litigation. Therefore, even assuming section 552.103 was timely raised, we do not believe that the department has met its burden in establishing the relatedness of the information to the pending litigation.

Lastly, we note that federal regulations require the department to release the HCFA form 2567, statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. See 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. In addition, one submitted form is made public pursuant to section 142.009(d)(5) of the Health and Safety Code, with the exception of certain medical record information that is confidential Medical Practice Act (the "MPA"), V.T.C.S. article 4495b. Information that is specifically made public by some other source of law may not generally be withheld under a discretionary exception to disclosure under the Open Records Act. See Open Records Decision No. 43 (1974).

We, therefore, affirm Open Records Letter No. 98-0386 (1998). If you have any questions about this ruling, please contact our office.

Yours very truly,

Loretta R. DeHay Deputy Chief

Open Records Division

Koretta Detay

Ref.: ID# 114660

cc: Ms. Jocelyn Lane

Managing Editor

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